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No. 86-1529

In the Supreme Court of the United States

OCTOBER TERM, 1986

VICTOR F. ORLOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the period during which the statute of limitations is tolled for summons enforcement proceedings under 26 U.S.C. 7609(e) includes the 60-day period during which an appeal could have been taken, where no appeal was ultimately taken but there was not full compliance with the summonses during the appeal period.

2. Whether the evidence was sufficient to support petitioner's convictions for filing materially false tax returns, in violation of 26 U.S.C. 7206(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 808 F.2d 1283. The order of the district court denying petitioner's motion to dismiss (Pet. App. A14-A15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1986. A petition for rehearing was denied on February 4, 1987 (Pet. App. A13). The petition for a writ of certiorari was filed on March 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of willfully subscribing to a materially false individual income tax return, in violation of 26

U.S.C. 7206(1). Petitioner was sentenced to three months in the custody of the Attorney General (to be served in a work release program) on Count 1 (the 1977 return), and he was sentenced to five years' probation and fined $3,000 on Count 2 (the 1978 return). Pet. App. A16-A17. The court of appeals affirmed (Pet. App. A1-A12).

1. The evidence at trial showed that petitioner failed to report income of $78,051 in 1977, and $36,727 in 1978, from various independent business ventures. The most profitable of those ventures was petitioner's sale of fish-cutting saws to Iceland Products, Inc., from which he received $59,210 in 1977, and $23,427 in 1978. Iceland paid $391,795 for the saws to Ned Gentry, who owned and operated Expedite Machine Shop, where the saws were manufactured. Gentry testified that Iceland paid Expedite and that he then paid petitioner whatever sums petitioner requested out of Expedite's account. Pet. App. A3-A4.

2. At trial, petitioner moved to dismiss Count 1 of the indictment, relating to his 1977 tax return, on statute of limitations grounds. The undisputed facts underlying that motion were as follows. The return was filed on October 15, 1978. During the period between July 1980 and September 1980, the Internal Revenue Service (IRS) issued administrative summonses to five banks requesting production of bank records relating to petitioner's accounts during 1977 and 1978. Pursuant to 26 U.S.C. 7609(a)(1), petitioner was notified of service of the summonses, and he exercised his right, under 26 U.S.C. (1976 ed.) 7609(b)(2), to direct the banks not to comply.[1] On Sep-

[1] That provision has since been amended by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 331, 96 Stat. 620. Although the notification requirement remains, a taxpayer no longer can halt compliance with a third-party summons and force the IRS to institute an enforcement proceeding simply by directing the summoned party not to comply. Rather, the burden of commencing litigation with respect to the validity of a third-party recordkeeper

tember 4, 1981, the IRS filed petitions in the United States District Court for the Eastern District of Missouri to enforce the summonses. Forty days later, on October 14, 1981, the district court entered orders enforcing the administrative summonses. Neither petitioner nor the banks appealed the enforcement orders during the 60 days permitted for filing a notice of appeal under Fed. R. App. P. 4(a)(1); the summonses were not fully complied with, however, until April 1982 (Pet. App. A8). Petitioner was indicted on January 18, 1985, six years and 92 days after he filed his 1977 tax return (*id.* at A5-A6). Accordingly, he claimed that Count 1 of the indictment was barred by the six-year statute of limitations on criminal tax prosecutions (26 U.S.C. 6531(5)).

3. The district court denied the motion to dismiss (Pet. App. A14-A15), and the court of appeals affirmed (*id.* at A1-A12). The courts concluded that the running of the statute had been tolled for a period of at least 100 days by virtue of 26 U.S.C. 7609(e). If a taxpayer takes any action to intervene with respect to a pending summons under Section 7609(b), as petitioner did here in staying compliance with the third-party summons, Section 7609(e) suspends the running of the statute of limitations for the period during which summons enforcement proceedings, including appeals, are pending. The court of appeals explained that, as long as there was not full compliance with the summonses, the enforcement proceedings were pend-

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summons has been shifted to the taxpayer, who is now required to institute a suit to quash the summons if he wishes to block compliance. Congress found the amendment necessary because "[t]he automatic stay provisions * * * [had] been so easy to use that taxpayers * * * frequently delayed enforcement of summonses without considering the merit of any objection they might have" (S. Rep. 97-494, 97th Cong., 2d Sess. Pt. 1, at 282 (1982)). Congress believed that the new provision would "eliminate most of the frivolous delay permitted under present law" (*ibid.*).

ing—and hence the statute of limitations was tolled—during the entire 60-day period within which an appeal could have been taken, even though no appeal was ultimately filed (Pet. App. A6-A7).

The court of appeals also rejected petitioner's contention that the evidence was insufficient to support petitioner's convictions. Petitioner argued that the government failed to prove that the unreported funds petitioner received in connection with the sales of the fish-cutting saws were not offset by expenses of what petitioner alleged was a partnership with Gentry. The court of appeals held that the government had sustained its burden of proof by introducing evidence that petitioner had received payments from the fish saw business that far exceeded his expenditures. The court held that the government was not required to prove the nonexistence of alleged partnership expenses in the absence of any evidence from petitioner that there were any such expenses. Pet. App. A8-A11. Petitioner also contended that most of the payments from Gentry were not income, but constituted reimbursement for expenses he incurred in connection with the sale of the saws. The court of appeals concluded that this contention turned on the credibility of the evidence and was a matter for the jury. Pet. App. A11 n.9. The court of appeals also noted that, "[e]ven if [petitioner's] account of his expenses on the venture in 1977 and 1978 is to believed, he still received and failed to report over $21,000 in 1977 and over $11,000 in 1978 in gross income from the venture" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, there is no reason for review by this Court.

1. Petitioner contends (Pet. 11-14) that the tolling provision of Section 7609(e) for the period that summons enforcement proceedings are pending does not include the

60-day period during which an appeal may be taken.[2] The thrust of petitioner's contention is that the court of appeals' contrary construction of the statute is a "liberal" one that violates the general principle that "exceptions to ordinary periods of limitations for criminal cases must be narrowly construed" (Pet. 11). This contention is without merit.

As the court of appeals correctly concluded (Pet. App. A6), its holding "follows directly from the statute." Section 7609(e) tolls the statute of limitations during the period that summons enforcement proceedings are "pending"; an action is ordinarily thought to be "pending" if it is not yet final because the time for taking an appeal has not expired. This Court has characterized the inclusion in a tolling provision of the time for taking an appeal as one of the "familiar principles which have been applied to statutes of limitations." *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 435 (1965). In that case, the Court found that where a suit in state court had been brought, a federal statute of limitations was to be "tolled during the pendency of the state suit," *i.e.*, "until the state court order dismissing the state action becomes final by the running of the time during which an appeal may be taken or the entry of a final judgment on appeal" (*ibid.* (footnote omitted)). In the absence of any contrary indication by Congress, Section 7609(e) should be given the same construction—namely, the summons enforcement proceeding should be considered "pending" until it becomes final upon the expiration of the appeal period, the entry of a

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[2] Petitioner does not dispute that the tolling provision of Section 7609(e) is applicable here. He therefore concedes that the statute of limitations was tolled during the 40-day period prior to the district court's entry of an order enforcing the summonses. The sole issue is whether the period during which summons enforcement proceedings are pending, within the meaning of Section 7609(e), includes the time during which an appeal may be taken.

final judgment on appeal, or compliance with the summons.[3]

The court of appeals' holding is fully consistent with the legislative purpose of the tolling provision. Section 7609 was added to the Internal Revenue Code by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1699. The section as a whole was designed to benefit taxpayers by giving them the right to receive notice of summonses to certain third-party recordkeepers and the right to direct third-party recordkeepers not to comply with the summonses, thus forcing the IRS to institute enforcement proceedings in which taxpayers could intervene. "[T]o prevent the use of this procedure by a taxpayer purely for the purpose of delay," Congress included Section 7609(e). S. Rep. 94-938, 94th Cong., 2d Sess. 371 (1976).

Petitioner took advantage of Section 7609 by giving the summoned banks notice that they were not to comply with the summons, thus forcing the government to institute judicial enforcement proceedings. In taking this action, petitioner also became bound by Section 7609(e), which tolled the statute of limitations during the pendency of the enforcement proceeding that petitioner in effect initiated. Under 26 U.S.C. 7609(b)(1), petitioner was free to intervene in the enforcement action until it became final, which included the right to intervene during the 60-day period for the purpose of taking an appeal (see *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977); Fed. R. App. P. 4(a)(1)). Thus, both as a practical matter and as a technical matter, the summons enforcement proceeding

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[3] As the court of appeals correctly noted (Pet. App. A7 & n.6), full compliance with a summons moots any appeal from the summons enforcement order. Thus, as a practical matter, a summons enforcement action would no longer be "pending" once there was full compliance, even if the time for taking an appeal had not yet run. In this case, it is undisputed that there was not full compliance with the summons until well after the time for taking an appeal had run. Pet. App. A8.

remained "pending" during this 60-day appeal period. The text and policies of Section 7609(e) therefore require that those 60 days be included in the period during which the statute of limitations was tolled.

2. Petitioner contends (Pet. 14-17) that the evidence was insufficient to support his convictions. Specifically, he claims that in finding the evidence sufficient, the courts below impermissibly placed the burden of proof for an element of the offense on the defendant. This contention is without merit.

A "material" misrepresentation within the meaning of Section 7206(1) is any misrepresentation that might interfere with the IRS's function of monitoring and verifying the self-reporting of income and self-assessment of taxes. *United States* v. *Taylor,* 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *DiVarco*, 484 F.2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974); *Siravo* v. *United States,* 377 F.2d 469, 472 (1st Cir. 1967). The government need not prove an understatement of "taxable" income; an understatement of "total income" or "gross receipts" is generally a "material" misrepresentation that violates Section 7206(1). See *United States* v. *Greenberg,* 735 F.2d 29 (2d Cir. 1984); *United States* v. *Strand,* 617 F.2d 571, 574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States* v. *Taylor,* 574 F.2d at 235-236.

The court of appeals therefore was correct in holding that "evidence that a partner received unreported payments from the alleged partnership entity in excess of his own expenditures in furtherance of the partnership's business establishes the government's prima facie case of a section 7206(1) violation" (Pet. App. A10). Here, the government proved beyond a reasonable doubt that Gentry paid petitioner $59,210 in 1977 and $23,427 in 1978 in connection with the manufacture and sale of fish-cutting saws. Even accepting petitioner's testimony that some of those funds were merely reimbursement for out-of-pocket

expenses, his unreported "gross receipts" still exceeded his expenditures by $21,000 in 1977 and by $11,000 in 1978 (see *id.* at A11 n.9). That evidence was more than sufficient to sustain his conviction.

The court of appeals correctly held that the government was not required to "prove the nonexistence of alleged partnership expenses" (Pet. App. A9); rather, the proof of unreported and unexplained receipts by petitioner established a prima facie case, and it was up to petitioner to produce evidence of offsetting partnership expenses (*id.* at A11). See, *e.g.*, *United States* v. *Leonard,* 524 F.2d 1076, 1083 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *Siravo* v. *United States,* 377 F.2d at 473-474. This holding in no way diminishes the government's burden of proving every element of the offense beyond a reasonable doubt; it simply places the burden of producing evidence of offsetting partnership losses upon the defendant. In any event, an understatement of gross receipts is in itself material, regardless of whether there were offsetting expenses. Evidence of such expenses is relevant only to rebut the government's proof that the defendant acted "willfully." *United States* v. *Taylor,* 574 F.2d at 237; *United States* v. *Leonard,* 524 F.2d at 1084.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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